IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2008 Session

RICKY LEE GENTRY v. PAMELA DELORSE GENTRY

Appeal from the Chancery Court for Montgomery County
No. 96-07-0071 Laurence M. McMillan, Jr., Chancellor

No. M2007-00876-COA-R3-CV - Filed January 31, 2008

Former husband appeals the denial of his petition to terminate or reduce his alimony obligations alleging that receipt by former wife of personal injury recovery and co-habitation by wife with another man six years before filing his petition are material and substantial changes of circumstances justifying a modification. Since the parties were aware of the personal injury claim at the time of the divorce, recovery under that claim was foreseeable and is not a material change in circumstances. Since ex-wife was not living with anyone when the petition was filed or thereafter the presumption of Tenn. Code Ann. § 36-5-121(f)(2)(B) never arose and, even if it had, ex-wife successfully rebutted it. The trial court's denial of former husband's request is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellant, Ricky Lee Gentry.

Thomas R. Meeks; Gregory D. Smith, Clarksville, Tennessee, for the appellee, Pamela Delorse Gentry.

OPINION

The parties were divorced on May 15, 1997. Under the Final Decree of Divorce, Mr. Gentry was ordered to pay his former wife alimony of $581 per month until her death or remarriage. Prior to the initiation of the divorce proceedings, Ms. Gentry had been injured in an automobile accident. The filings in the divorce action indicate that her injuries had rendered her unable to work at that time and that she was pursuing a personal injury claim at the time of the divorce. In February of 2004, Ms. Gentry ultimately recovered $46,800 in settlement of her personal injury claim.

In September of 2005, Mr. Gentry filed a petition to terminate or modify his alimony obligation. He asserted in his petition that his alimony obligation should be modified due to Ms.

Gentry's $46,000 recovery. Mr. Gentry also alleged as an alternate ground in his petition that Ms. Gentry had lived with another man and, under Tenn. Code Ann. § 36-5-121(f)(2)(B), it is presumed that the man contributed to Ms. Gentry's support. Mr. Gentry's petition acknowledged that Ms. Gentry was not then living with another man.

The trial court denied Mr. Gentry's request finding that Ms. Gentry's personal injury damage award was not a material change in circumstances that was not foreseeable at the time of the divorce decree. As for living with another man, the trial court found that Ms. Gentry had rebutted any presumption that another man was contributing to Ms. Gentry's support. Mr. Gentry appeals the trial court's findings on both grounds.

I. STANDARD FOR MODIFICATION

Modifications of alimony may be granted only upon a showing of a substantial and material change in circumstances since entry of the original support order. Tenn. Code Ann. §36-5-121(f)(2)(A); *Bogan v. Bogan*, 60 S.W.3d 721, 727-28 (Tenn. 2001). In order to be material, a change in circumstances must have been unforeseeable, unanticipated, or not within the contemplation of the parties at the time of the decree. *Id*. at 728; *Elliot v. Elliot*, 825 S.W.2d 87, 90 (Tenn. Ct. App. 1991). To be considered substantial, the change must significantly affect either the obligor's ability to pay or the obligee's need for support. *Bogan*, 60 S.W.3d at 728; *Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991).

Even a substantial and material change of circumstances does not automatically result in a modification. Modification must also be justified under the factors relevant to an initial award of alimony, particularly the receiving spouse's need and the paying spouse's ability to pay. *Bogan*, 60 S.W.3d at 730; *Wright v. Quillen*, 83 S.W.3d 768, 773 (Tenn. Ct. App. 2002). "As evidenced by its permissive language, the statute permitting modification of support awards contemplates that a trial court has no duty to reduce or terminate an award merely because it finds a substantial and material change of circumstances." *Bogan*, 60 S.W.3d at 730. Where there has been such a change of circumstances, the ability of the obligor spouse to provide support must be given equal consideration to the obligee spouse's need. *Id*.

Our standard of review for a modification decision has been explained by our Supreme Court:

> Because modification of a spousal support award is "factually driven and calls for a careful balancing of numerous factors," *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989), a trial court's decision to modify support payments is given "wide latitude" within its range of discretion, *see Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999). In particular, the question of "[w]hether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court." *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999) (citations omitted). Accordingly, "[a]ppellate courts are generally disinclined to second-guess a trial judge's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the

> applicable statutes." *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998); *see also Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) ("As a general matter, we are disinclined to alter a trial court's spousal support decision unless the court manifestly abused its discretion"). When the trial court has set forth its factual findings in the record, we will presume the correctness of these findings so long as the evidence does not preponderate against them. *See, e.g.*, *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000); *see also* Tenn. R. App. P. 13(d).

Bogan, 60 S.W.3d at 727.

II. THE PERSONAL INJURY AWARD

With regard to the personal injury award, the trial court held:

> The husband also offered proof that the wife received in excess of $48,000 as her share of a personal injury award due to significant injuries she sustained prior to the divorce in an automobile accident. At trial, it was shown that approximately $14,300 of the award was spent on or for the benefit of the wife, and the remaining money was spent by the wife on behalf of her children, and that the money has all been spent. The court finds that the parties knew of the wife's personal injury claim at the time of the divorce due to the mention of the matter in the Final Decree. Therefore, the court finds that the receipt by the wife of her award does not constitute a substantial, material changed of circumstances, not foreseeable at the time of the divorce.

The record shows that in the divorce action, Mr. Gentry filed a counterclaim asking that he be awarded half of any monetary recovery Ms. Gentry received as a result of the automobile accident. In the Final Decree, the court dismissed Mr. Gentry's counterclaim. The Final Decree provided, however, that Mr. Gentry would be entitled recovery for loss of consortium and would be entitled to amounts he paid on Ms. Gentry's medical bills as a result of the accident.[1]

Accordingly, as the trial court found, the parties and the court that heard the divorce were aware at the time of the divorce that Ms. Gentry had a claim for personal injuries for which she might recover in the future. Mr. Gentry argues that, although he knew there was a potential for recovery, he did not foresee the amount. We do not believe that such specific foreseeability is required. Further, he was certainly not without a basis to understand the extent of her damages.

We agree with the trial court's finding that the change of circumstances, *i.e.*, Ms. Gentry receiving a substantial recovery for her injuries, was foreseeable at the time of the Final Decree. Mr. Gentry's request for half of the proceeds of any recovery by Ms. Gentry on her personal injury claim was denied by the trial court in the Final Decree. Since a recovery by Ms. Gentry was foreseeable,

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[1] The record is silent as to whether Mr. Gentry recovered on his claim for loss of consortium or for medical bills.

anticipated, and clearly within the contemplation of the parties and the court, it was not a material change in circumstances.[2] *Bogan*, 60 S.W.3d at 727.

III. COHABITATION

Generally, the party seeking the modification bears the burden of proving the modification is warranted. *Azbill v. Azbill,* 661 S.W.2d 682, 686 (Tenn. 1983); *Wright*, 83 S.W.3d at 772; *Elliot*, 825 S.W.2d at 90. However, the legislature has identified one change in circumstances that will trigger a review of the continued need for alimony and that shifts the evidentiary burden. The relevant provision, Tenn. Code Ann. § 36-5-121(f)(2)(B), sometimes referred to as the cohabitation statute, creates a rebuttable presumption that the recipient of alimony *in futuro* who lives with a third person is either receiving support from the third person or is contributing to the third person's support and, in either case, no longer needs the previously awarded amount of alimony. Tenn. Code Ann. § 36-5-121(f)(2)(B) provides as follows:

> (B) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that:
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> (i) The third person is contributing to the support of the alimony recipient and the alimony recipient therefore does not need the amount of support previously awarded, and the court therefore should suspend all or part of the alimony obligation of the former spouse; or
>
> (ii) The third person is receiving support from the alimony recipient and the alimony recipient therefore does not need the amount of alimony previously awarded and the court therefore should suspend all or part of the alimony obligation of the former spouse.

Under Tenn. Code Ann. § 36-5-121(f)(2)(B),[3] cohabitation does not automatically end the right of the recipient to receive alimony; it merely shifts the evidentiary burden in a modification proceeding. *Isbell v. Isbell*, 816 S.W.2d 735, 738 (Tenn. 1991); *Wright*, 83 S.W.3d at 775. Once the presumption arises, the alimony recipient bears the burden of demonstrating a need for the previously awarded alimony, notwithstanding the cohabitation. *Azbill*, 661 S.W.2d at 686; *Wright*, 83 S.W.3d at 775.

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[2]Mr. Gentry also argues that Ms. Gentry wasted or spent frivolously most of the money she received in the settlement. Had she been more reasonable or frugal, he asserts, she would not need as much alimony from him. While we understand his frustration, we find no authority for the proposition that a foolish approach to personal finances constitutes a material change in circumstances. His argument must rest on the settlement award to Ms. Gentry, which may have been relevant to her continued need absent its foreseeability, not on what she did with it.

[3]This language in Tenn. Code Ann.§ 36-5-121(f)(2)(B) was previously found in Tenn. Code Ann.§ 36-5-101(a)(3) prior to amendments by Acts 2005, ch. 287, effective July 1, 2005.

In the present case, Mr. Gentry rested his reliance on the cohabitation statute on his belief that Ms. Gentry had lived with Joe Boileau. However, that belief was based on events occurring in 1999-2000. Mr. Gentry testified that between early 1999 and 2000 he had picked up his youngest daughter at Mr. Boileau's home for their periodic weekend visitation. Mr. Gentry also offered testimony that several of his alimony payments were directed to Ms. Gentry at the residence of Mr. Boileau. Mr. Gentry filed his petition in 2005, some five years after he concedes Ms. Gentry was no longer even allegedly living with someone else.

Ms. Gentry testified that while the man in question was her friend, she had never lived with him except for a 30 day period while he was fixing her vehicle. The trial court found that Ms. Gentry also acknowledged that in addition she would stay with Mr. Boileau on the weekends for a period of time. However, she testified that she had never moved out of her home or suspended the utilities. Ms. Gentry provided other witnesses who testified they had known her for many years, visited her frequently, and that she had never moved out of the marital residence.

Based on Mr. Gentry's allegations regarding the time frame at issue, we find the presumption of Tenn. Code Ann. § 36-5-121(f)(2)(B) never arose because the facts make the statute inapplicable. In *Woodall v. Woodall*, M2003-02046-COA-R3-CV, 2004 WL 2345814 (Tenn. Ct. App. 2004) (perm. app. denied March 21, 2005), this court held:

> [T]he statute uses the present tense, "In all cases where a person is receiving alimony in futuro and the alimony recipient **lives** with a third person . . . . " Tenn. Code Ann. § 36-5-101(a)(3) [now Tenn. Code Ann. § 36-5-121(f)(2)(B)] (emphasis added). Second, even if the presumptions of support and lack of need arise and are unrebutted, the court's remedy is to "**suspend** all or part of the alimony obligation," not terminate the alimony. Tenn. Code Ann. § 36-5-101(a)(3)(A) and (B) [now Tenn. Code Ann. § 36-5-121(f)(2)(B)(i)] (emphasis added). The clear implication is that if the situation justifying suspension ceases to exist, the alimony recipient may seek reinstatement of support from the former spouse. *See Azbill*, 661 S.W.2d at 687 (ordering suspension of alimony payments from the date of the filing of the modification petition "until such time as a change of circumstances warrants reinstatement in whole or in part"). *Id.* at 687.
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> Thus, a cohabiting alimony recipient whose alimony is suspended in whole or in part on the basis of Tenn. Code Ann. § 36-5-101(a)(3) [now Tenn. Code Ann. § 36-5-121(f)(2)(B)] could later seek a reinstatement or modification based on changed circumstances, specifically that he or she is no longer living with a third person and is no longer receiving any support from, or contributing support to, that person. We can see no authority for, and no purpose to be served by, requiring a ruling based on past cohabitation and the filing and hearing of a subsequent request for reinstatement when cohabitation ceases before the trial on the original modification petition. The trial court should, as did the court herein, consider the situation that existed at trial.

2004 WL 2345814, at *5-6 (footnote omitted); *Strait v. Strait*, E2005-02382, 2006 WL 3431933, at *5-6 (Tenn. Ct. App. Nov. 29, 2006) (no Tenn. R. App. P. 11 application filed).

Thus, regardless of whether Ms. Gentry had lived with Mr. Boileau, and regardless of the length of time, she was living alone in the martial residence long before the petition was filed. There could be no presumption that she was receiving or providing financial assistance due to cohabitation. Accordingly, Mr. Gentry failed to establish the requisite facts that would bring his claim within Tenn. Code Ann. § 36-5-121(f)(2)(B).

The trial court herein found that Ms. Gentry rebutted the statutory presumption that she did not need to amount of alimony previously ordered and made the following findings:

> The wife offered testimony that she is unemployed, and unemployable, and that she is in need of the alimony payments from the husband. The court finds that the wife takes assistance from Urban Ministries and from local churches. She is in need of the alimony payments.

Accordingly, the trial court found that the "previous alimony award shall not be terminated, suspended or modified."

While we have concluded that the cohabitation statute was simply not applicable to the circumstances that existed at trial, we find that the evidence does not preponderate against the trial court's finding that Ms. Gentry continued to need the alimony previously awarded her. Therefore, even if the statute applied to create a presumption, the facts of the case rebutted that presumption.

IV. CONCLUSION

We conclude that Mr. Gentry failed to establish a material and substantial change in circumstances that warranted a revision in alimony. Accordingly, the trial court's denial of Mr. Gentry's petition is affirmed. Costs of this appeal are taxed to the appellant, Ricky Lee Gentry, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE